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In The

Supreme Court of the United States

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION,

Petitioner,

v.

TNS, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the Sixth Circuit's unanimous decision to vacate an order of the National Labor Relations Board issued under "[a]n infrequently used provision of the NLRA," Pet. App. 2a, based in part on the Board's "inexcusable delay" in deciding the case, Pet. App. 32a-34a, where the Court of Appeals first determined that the Board's decision concerning the employer's liability was not supported by substantial evidence in the voluminous record created during the eighteen years that the case had been pending, and where the Court of Appeals found on the particular facts that any award of relief that might be ordered against the employer – assuming a liability finding that was supported by substantial evidence on a new record – would be inequitable in light of changed factual circumstances during the pendency of the case.

RULE 29.6 STATEMENT

Respondent TNS, Inc. is a wholly-owned subsidiary of Aerojet-General Corporation, which is in turn a wholly-owned subsidiary of GenCorp Inc., a publicly-owned corporation. Aerojet Ordnance Tennessee, Inc. is also an affiliate of TNS, Inc.

Petitioner is the Paper, Allied-Industrial, Chemical & Energy Workers International Union. It was an intervenor in the court below.

The National Labor Relations Board is also a respondent. S. Ct. Rule 12.6. The NLRB has not sought review of the decision below in this Court.

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BRIEF IN OPPOSITION

Respondent TNS, Inc. ("TNS") respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION

The petition does not meet any of the established criteria warranting certiorari. *See* S. Ct. Rule 10. Instead, Petitioner Paper, Allied-Industrial, Chemical & Energy Workers International Union ("Union") seeks relief from the well-reasoned, unanimous decision of the Sixth Circuit by attempting to manufacture a circuit split that, upon closer analysis, simply does not exist. At the same time, the Union ignores the fact that the Court of Appeals rejected its claim to relief on the merits after carefully considering the facts in the record and concluding that the National Labor Relations Board ("NLRB" or "Board") order against TNS was not supported by substantial evidence, despite the voluminous record created over the twenty years that this case has been ongoing. Appropriately, the Union has not sought review in this Court of that dispositive, fact-sensitive issue, but instead limits its challenge to the Sixth Circuit's method of disposing of the case after deciding the merits. The Board itself has not sought review in this Court of any aspect of the Sixth Circuit's opinion. Under these unique and extreme circumstances – a case that has been ongoing for over twenty years and in which, after careful review of the particular facts in the record, the Court of Appeals found that liability on the part of an employer had not been established – the Court of Appeals appropriately decided to vacate the Board's

order. No "compelling reason[ ]" or "important" issue justifies any further attention to this case by this Court. S. Ct. Rule 10.

COUNTERSTATEMENT

A. Factual Background.

This case arises from a labor dispute between respondent TNS and a labor union representing employees at TNS's Jonesboro, Tennessee facility, Petitioner Paper, Allied-Industrial, Chemical & Energy Workers International Union ("Union"). This dispute began more than twenty years ago in the spring of 1981. Pet. App. 3a-5a.

At its Jonesboro facility, TNS manufactures armor-piercing ammunition. One of the essential ingredients of this product is depleted uranium. Pet. App. 3a. Depleted uranium is a low-level radioactive substance that presents a potential health hazard only if ingested or inhaled in sufficient quantities or over a long period of time. *Id.* at 3a.

Because TNS's business involves the use and handling of a radioactive substance, the Nuclear Regulatory Commission ("NRC") and Tennessee Division of Radiological Health ("TDRH") monitor and regulate TNS's facility in order to protect workers and the public from any risks posed. During the relevant time period, the TDRH was primarily responsible, as a result of a delegation of authority by the NRC, for devising and enforcing health and safety regulations applicable to TNS's Jonesboro facility. Accordingly, the TDRH, occasionally accompanied by NRC officials, periodically inspected the Jonesboro facility. The TDRH was empowered to close facilities that did not

comply with applicable health and safety regulations. *Id.* at 41a.

Also during the relevant time period, TNS had in place a contaminant control system designed to reduce any depleted uranium dust in the workplace, and TNS closely monitored the safety and health of its employees. *Id.* at 41a-43a.

Leading up to the events giving rise to this case, TNS and the Union had a collective bargaining agreement in place that was set to expire at midnight on April 30, 1981. ALJ Decision 90-91 (hereinafter "ALJD ___") (filed as "Lodging Material" by petitioner with its petition). As that date approached, on March 10, 1981, the Union sent a letter to TNS expressing purported safety concerns with respect to the Jonesboro facility. Pet. App. 3a-4a. Then, on March 24, 1981, TNS and the Union began negotiations concerning a new collective bargaining agreement. *Id.* During the negotiations, the parties discussed the alleged safety concerns of the Union as well as other economic issues pertaining to the employees. *Id.* When the negotiations did not result in a new collective bargaining agreement, the employees walked out on May 1, 1981. *Id.*

In the nine months prior to the Union's work stoppage in May 1981, the TDRH inspected TNS's Jonesboro facility eight times, and found no situation warranting the revocation or suspension of TNS's operating license, nor did it find any other basis for taking any emergency action at the facility. *Id.* at 43a. In fact, the inspection immediately prior to the work stoppage found "no crisis or eminent [sic] threat to health and safety." *Id.* at 22a. The employees, however, claimed that their walkout was protected by § 502 of the NLRA. That "infrequently used provision," *id.*

at 2a, provides that "the quitting of labor by * * * employees in good faith because of abnormally dangerous conditions * * * [shall not] be deemed a strike." 29 U.S.C. § 143. The Union asserted that the walkout did not qualify as a "strike" because it was motivated by a good faith belief that the conditions in the workplace were abnormally dangerous.

On July 7, 1981, TNS advised the Union that unless the employees agreed to return to work, it planned to hire permanent replacements beginning on July 16, 1981. Pet. App. 5a. The employees did not return to work, and TNS hired permanent replacements. *Id.* Then, in February 1982, the Union made an unconditional offer to return to work. By that time, however, TNS had hired permanent replacements, and, consequently, refused to reinstate the striking employees other than to fill vacancies as they occurred. *Id.* Subsequently in May 1982, the employees sought to decertify the Union, at which point TNS withdrew recognition and refused to bargain further with the Union. *Id.* at 45a-46a.

Next, in August 1982, the striking employees turned to the NLRB, commencing the case that now, twenty years later, is before this Court.

B. Course of Proceedings

As the court below explained, this case has a "complicated procedural history." Pet. App. 26a. Pursuant to a series of unfair labor practice charges filed by the Union, the NLRB's General Counsel filed complaints against TNS in August 1982 and April 1983, which were subsequently consolidated. ALJD 2. The complaints alleged (1) that TNS violated §§ 8(a)(1) and (3) of the NLRA by refusing to

reinstate the striking employees when they offered to return to work and (2) that TNS violated § 8(a)(5) of the Act when it withdrew recognition and refused to bargain with the Union. Pet. App. 39a. These complaints were premised on the contention that the work stoppage was protected by § 502 of the NLRA, 29 U.S.C. § 143. Section 502 is a seldom-used provision which states that a work stoppage does not qualify as a "strike" when it is motivated by the employees' good faith belief that their working conditions are "abnormally dangerous."

1. Proceedings before the Administrative Law Judges

The matter was initially assigned to an ALJ who considered several motions and conducted some evidentiary hearings between April and September 1983. The ALJ was eventually recused, and the case assigned to a different ALJ. Afterwards, the replacement ALJ began conducting evidentiary hearings in November 1983. Over the following eighteen months, the ALJ conducted sixty-seven days of trial. The evidentiary proceedings closed on April 3, 1985, already almost four years after the employees walked off their jobs and almost three years after the Board's General Counsel filed the first complaint. This concluded the creation of the evidentiary record in this case – a prodigious record of almost 13,000 pages of testimony and hundreds of exhibits totaling in excess of 23,000 pages. ALJD 2-3.

Two years later, on July 31, 1987, the ALJ issued her recommended decision, concluding that TNS had committed an unfair labor practice by permanently replacing and refusing to reinstate the striking employees upon their

unconditional offer to return to work, and finding that the employees' actions were protected by § 502 of the NLRA. ALJD 147-148. The ALJ recommended the reinstatement of the employees to their former positions or, if the positions were unavailable, to substantially equivalent positions, all without prejudice to their seniority or any other rights enjoyed prior to the work stoppage. *Id.* at 157-158. The ALJ further recommended that the employees be awarded backpay, and that TNS be ordered to resume bargaining with the Union. *Id.*

2. Proceedings before the Board

The case next moved to the NLRB for its consideration of the ALJ's recommended decision. Over five years later, on December 23, 1992, a four-member panel of the Board rejected the ALJ's findings, concluding that the record did not support a finding that TNS had violated § 502. *TNS, Inc.*, 309 N.L.R.B. 1348 (1992). Although three of the panel members agreed that TNS had not engaged in unlawful activity, the panel was fractured as to the basis for this conclusion. Pet. App. 6a.

3. Proceedings before the D.C. Circuit

The Union petitioned the Court of Appeals for the District of Columbia Circuit to review the Board's decision. On February 14, 1995, that court concluded that it could not discern the basis for the Board's decision and remanded the case for further review and for an explanation of the basis for the Board's decision that commanded a majority of the Board. *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 88-93 (D.C. Cir.), *cert. denied*, 516 U.S. 821 (1995).

4. More Proceedings before the Board

On remand to the NLRB, the matter was assigned to a new three-member panel. Pet. App. 35a. The Board considered the case for another four years before issuing a new decision, this time articulating a new standard for assessing liability under § 502:

> In order to establish that a work stoppage is protected under Section 502, the General Counsel must demonstrate by a preponderance of the evidence that the employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees' belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety. [*Id.* at 38a-39a.]

Upon examining the same evidentiary record that had been before it the first time around, the Board now concluded that the work stoppage involved in this case satisfied each of the newly-announced elements, and was therefore protected by § 502. *Id.* at 39a. Therefore, the Board concluded that TNS violated § 502 by failing to reinstate the employees after their unconditional offer to return to work seventeen years earlier in February 1982. *Id.* The Board also ordered TNS to resume bargaining with the Union. *Id.* at 66a.

5. Proceedings before the Sixth Circuit

TNS petitioned the Sixth Circuit to review the Board's decision, and the NLRB cross-applied for enforcement of its order. The Union – the only petitioner before this Court – intervened. In a unanimous decision, the Sixth Circuit

decided that the Board's formulation of the legal test for liability under § 502 was entitled to deference, but that the Board's factual determination that TNS had violated that provision was not supported by substantial evidence in the record. After discussing the evidence in the voluminous record said to support the Board's decision, the court below concluded:

> In the present case, three of the four pieces of evidence relied upon by the Board are not terribly persuasive, and one piece of evidence (the respirator use) is either irrelevant to the danger inquiry or evidence of improved conditions. When we also take into account the NRC and TDRH standards and those agencies' lack of decisive regulatory action as evidence contradicting that evidence, it becomes clear that the Board's conclusion – that objective evidence supported the employees' belief that their workplace had become too dangerous to work in – is simply not supported by substantial evidence on the record considered as a whole. [Pet. App. 32a.]

Next, the court addressed the issue of the Board's extraordinary delay in handling the case. The court began by noting that "denying enforcement of an order solely on the basis of delay is inappropriate," and quoted from this Court's decision in *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969). Pet. App. 32a. The court noted, however, that "courts sometimes refuse to enforce agency awards when undue delay has made their enforcement inequitable." *Id.* at 33a. The court then reviewed the particular facts that warranted vacating rather than remanding the order to the NLRB for still further proceedings:

> [T]he case was filed with the Board in 1982. The Board's ALJ did not issue a decision until 1987.

> The Board did not issue its decision affirming the ALJ until 1992, more than five years later. After remand by the District of Columbia Circuit in 1995, the Board did not issue its second decision until September 1999, more than four years later. This court does not see a reasonable way to hold the Company responsible for damages accruing over all of this time, especially when its structure and business changed in the interim. [*Id.* at 34a.]

It is that part of the court's decision that is the subject of the Union's petition for a writ of certiorari. The NLRB itself has not sought review in this Court.

REASONS FOR DENYING THE WRIT

Compared to the long history of this case, the merits of the Union's petition warrant briefer treatment. The only question presented in the Union's petition asks the Court to grant certiorari to review whether it was appropriate for the Sixth Circuit to vacate, rather than remand, the decision of the NLRB after that court determined that the NLRB's factual findings in its order were not supported by substantial evidence in the record, and, consequently, that after 18 years of litigation in this case, no violation of the applicable labor laws had been shown on the part of TNS. Under these unusual circumstances, the Sixth Circuit decided that vacatur, rather than remand, was appropriate and that this case should come to a long-overdue conclusion.

The Sixth Circuit's decision is perfectly consistent with this Court's precedent, as well as the decisions from other courts of appeal. The conflict that the Union seeks to

depict in its petition is illusory. Moreover, under the unique and extreme circumstances of this case, the Sixth Circuit's decision to vacate the NLRB's order was an appropriate response to the Board's inordinate and inexcusable delay in handling this case. This is particularly true in light of the Court of Appeals' primary holding that the factual underpinnings of the Board's order were not supported by substantial evidence in the record. In light of that holding, a remand would have served no practical or legal purpose and would only have resulted in additional delay and expense in this decades-old case. Therefore, this case does not present the type of important issues of public concern that warrant this Court's attention.

I. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE PRECEDENT OF THIS COURT OR OF OTHER COURTS OF APPEAL.

1. There is no conflict between the Sixth Circuit's decision and the precedent of this Court or of the other courts of appeal, much less a conflict "on the same important matter." S. Ct. Rule 10. After concluding that the NLRB's order was not entitled to be enforced because the Board's factual findings were not supported by substantial evidence, the Sixth Circuit turned to TNS's argument that, as a result of the NLRB's inexcusable and unnecessary delay in deciding this case, it would be inequitable to enforce any order against TNS in light of the changed circumstances at the company.

The first thing the Sixth Circuit did in addressing this argument was acknowledge the very Supreme Court case that the Union is now saying it violated, *NLRB v. J. H. Rutter-Rex Mfg. Co.* In that case, this Court considered the propriety of the Fifth Circuit's decision to modify an NLRB

order in response to the Board's "inordinate delay," by eliminating the employer's obligation to pay backpay accruing after a certain date. 396 U.S. at 262. In rejecting the actions of the lower court, this Court noted that the NLRB has broad remedial powers subject to limited judicial review "upon finding that an unfair labor practice has been committed." *Id.* at 262-263. The Court recognized that backpay awards are a traditional remedy available to the NLRB designed, in part, "to restore, so far as possible, the status quo that would have obtained but for the wrongful act." *Id.* at 265. The Court rejected the Fifth Circuit's modification of the NLRB's remedy because that modification "left the employees who had not been reinstated * * * worse off than they would have been but for the company's wrongful action," and stated:

> Either the company or the employees had to bear the cost of the Board's delay. The Board placed that cost upon the company, which had wrongfully failed to reinstate the employees. In an effort to discipline the Board for its delay, the court shifted part of that cost from the wrongdoing company to the innocent employees. * * * This Court has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers. [*Id.* at 263-265.]

Likewise, the Sixth Circuit acknowledged this Court's subsequent decision in *NLRB v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 480*, 466 U.S. 720 (1984), in which this Court applied the *Rutter-Rex* holding in the context of a court of appeals' decision to modify an NLRB order – again as a result of the Board's delay – by eliminating certain employees'

entitlement to backpay. Citing *Rutter-Rex*, this Court explained that a "Court of Appeals may not refuse to enforce a backpay order *merely* because of the Board's delay subsequent to that order in formulating a backpay specification." 466 U.S. at 724 (emphasis added). As did the Court in *Rutter-Rex*, the Court again focused on the impropriety of denying backpay to "wronged employees" as a result of the Board's delay. *Id.* at 725 (quoting *Rutter Rex*, 396 U.S. at 265).

In both *Rutter-Rex* and *Ironworkers*, this Court was concerned that costs related to the Board's delay not be shifted from a "wrongdoing employer" to "wronged employees." Both cases involved delays in the *compliance* stage of an NLRB proceeding, after it had been established that the employees had in fact been "wronged" and that the employer had violated the labor laws. Under those circumstances, the balance of the equities is understandably tilted in favor of the employees in allocating the consequences of the NLRB's delay.

In contrast to these decisions from this Court, which the Sixth Circuit below expressly acknowledged, this case does not involve a court's decision to modify the remedies to which "wronged employees" are entitled. After twenty years of legal wrangling over the issue of liability under § 502, the Sixth Circuit concluded, based on a careful review of the facts in the record, that the NLRB had not shown that TNS violated its employees' rights under the NLRA at all. And it bears repeating that neither the Union nor the NLRB have asked this Court to review that issue. Therefore, unlike the employees involved in *Rutter-Rex* and *Ironworkers*, it has not been shown that the employees in this case were "wronged." Instead, as the Sixth Circuit's decision recognized, the equities in this case favor

the employer, which has not been shown to have violated the relevant labor laws, but has nonetheless spent twenty years defending itself. Therefore, the absence of liability on the part of TNS – in addition to the extreme factual circumstances concerning the Board's delay – makes this case completely distinguishable from the precedent on which the Union relies. Because the Sixth Circuit recognized, and acted consistent with, this Court's authorities, there is no reason for the Court to grant the Union's petition in this case.

2. Nor does the lower court's decision conflict with the decisions of other courts of appeals. In arguing to the contrary, the Union primarily relies on the opinion of the D.C. Circuit in *Southwest Merchandising Corp. v. NLRB*, 943 F.2d 1354 (1991). For the same reasons that the Sixth Circuit acted consistently with this Court's precedent, however, its decision does not conflict with *Southwest Merchandising*. In that case, an employer argued that as a result of a four-and-a-half year delay by the Board in reviewing an ALJ's decision, the court should refuse to enforce the NLRB's order. Relying on *Rutter-Rex*, the D.C. Circuit rejected the employer's argument under the facts of that case, but did not rule out the possibility that the court "[had] the authority to invoke laches against the Board in an extraordinary case." *Southwest Merch.*, 943 F.2d at 1358.[1]

[1] Although the D.C. Circuit determined that a remand was necessary in *Southwest Merchandising* given ambiguity in the Board's order, *see id.* at 1358-62, following the remand, the court enforced, in part, the Board's order against the employer. *See Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995). Therefore, unlike

(Continued on following page)

Unlike here, the court in *Southwest Merchandising* had not already rejected a finding of liability when asked to put an end to Board proceedings because of delay. Moreover, unlike here, the delay did not stretch over two decades, but instead was a relatively short four-and-a-half years. In addition, the *Southwest Merchandising* court specifically left open the possibility that Board delay might result in nonenforcement "in an extraordinary case." 943 F.2d at 1358. There is no reason to assume that the court would not agree with the court below that this was just such an "extraordinary" case.

Nor does the case before the Court conflict with the D.C. Circuit's decision in *Consolidated Freightways v. NLRB*, 892 F.2d 1052 (D.C. Cir.), *cert. denied*, 498 U.S. 817 (1990), another case cited by the Union in its petition. That case amounts to little more than a straightforward application of *Rutter-Rex*. In *Consolidated*, the court held that it would enforce the Board's award of backpay despite the Board's delay of six years in deciding a case following a remand. *Id.* at 1059. There again, because liability on the employer's part was established in that case, it has no bearing on the Sixth Circuit's actions below.

Finally, the Union seeks support from a portion of the Seventh Circuit's decision in *NLRB v. Thill, Inc.*, 980 F.2d 1137 (7th Cir. 1992). In *Thill*, the court explained that despite delay on the part of the Board, the NLRB appropriately awarded interest on an award of backpay in a

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the case before the Sixth Circuit, the D.C. Circuit never concluded that the NLRB's factual findings concerning liability were not supported by substantial evidence in the record.

case in which "those workers' entitlement to backpay cannot be doubted." *Id.* at 1141. Under those circumstances, the court correctly recognized that "the company was not harmed, so far as the backpay order [was] concerned * * * [because] [t]he Board's delays meant that the company had that much more time to enjoy the use of the money that it should have given to its workers back in 1981." *Id.* This holding sheds no light on the situation in the case now before the Court, and in no way creates a split of authority between the circuits. Indeed, as discussed below, a later part of the *Thill* decision supports the actions taken by the Sixth Circuit in this case, because the Seventh Circuit went on to deny enforcement of some portions of the Board's order in light of its delay. *Id.* at 1143. *See also NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62 (2d Cir. 1992) (following similar approach and concluding that delay was not basis for reducing damages but was basis for refusing to enforce bargaining order where underlying circumstances had changed).

This Court has long followed the policy of "not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). No such conflict or issue of importance exists here warranting this Court's review.

3. Moreover, the Sixth Circuit's approach in this case is consistent with this Court's decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), concerning the role of courts of appeals in enforcing the Board's orders, and with several decisions from other courts of

appeals recognizing that courts have discretion under exceptional circumstances to decline to enforce NLRB orders which follow an inexcusable delay.

First, the Sixth Circuit faithfully followed *Universal Camera* throughout its decision in this case, including this Court's recognition of the responsibility imposed on the courts of appeals in deciding whether NLRB orders should be enforced. In *Universal Camera*, this Court acknowledged this important role for courts of appeals, stating:

> [C]ourts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is no less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. [340 U.S. at 490.]

Cf. Rutter-Rex, 396 U.S. at 264-266 (acknowledging this basic tenet, although concluding that delay did not excuse enforcement "in this case"). Therefore, this Court has recognized that courts of appeals play an important role in ensuring the fair enforcement of the nation's labor laws, as the Sixth Circuit did in this case.

Furthermore, in cases with facts similar to this case, other courts of appeal have followed the same approach as the Sixth Circuit below. In the most analogous case – in that it also involved a court finding that the Board's

liability determination was unsupported – the Second Circuit in *Emhart Industries v. NLRB*, 907 F.2d 372 (2d Cir. 1990) reached the same result as the court below. In that case, the court of appeals considered an order by the NLRB finding that an employer had committed an unfair labor practice "almost six years earlier." *Id.* at 373-374. As an initial matter, as in the case now before the Court, the Second Circuit found that the Board's factual findings were not supported by substantial evidence in the record. *Id.* at 376-378. The court then continued, however, by noting that "[a]lthough the reasons explained above provide a more than adequate basis for our decision, we believe that the board's inexcusable delay in deciding this case – or, more precisely, the effects of that delay on the efficacy and reasonableness of the board's remedy – provide an independent ground for denying enforcement." *Id.* at 378.

In explaining this conclusion, the Second Circuit noted the importance of a speedy resolution to labor cases in order for remedies to be effective, and stated that both employees and employers may be harmed by excessive administrative delay. *Id.* at 379. The court also recognized that in cases like *Rutter-Rex* and *Ironworkers*, where a court is asked to consider the effects of delay on the part of the Board only after the Board has found a violation on the part of an employer, "the majority view seems to have been that denying enforcement on the ground of delay alone unfairly 'punishes employees for the Board's nonfeasance.'" *Id.* at 379 (quoting *Ironworkers,* 466 U.S. at 725 and citing *Rutter-Rex*). Nonetheless, the Second Circuit also noted that this Court had recognized that "the courts of appeals are charged by [C]ongress with 'responsibility

for the reasonableness and fairness of Labor Board decisions.'" *Id.* (quoting *Universal Camera*, 340 U.S. at 490).

On the facts before it the Second Circuit concluded that "the passage of time between the company's action and the board's remedy has so changed the underlying situation at Emhart that enforcement of the order now not only would undermine more labor policies that [sic] it would advance, but also would mock reality." *Id.* at 379-380.

Similarly, in *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181 (2d Cir.), *cert. denied*, 502 U.S. 856 (1991), the Second Circuit went even further by finding that an award of backpay should be modified in light of the Board's delay. The court noted that "[e]lementary considerations of fairness" come into play when deciding whether to enforce a Board order, and stated that courts should not enforce orders where changed circumstances would result in a remedy that is "draconian" to an employer. *Id.* at 189.

Other circuits also recognize that changes to underlying circumstances that result during an unreasonably long delay by the Board may justify declining enforcement. For example, in *Thill*, which the Union cites for its straightforward application of *Rutter-Rex*, the Seventh Circuit went on to note that other portions of the Board's order were unenforceable as a result of the changed circumstances during the Board's delay. *See Thill*, 980 F.2d at 1142-43. The court acknowledged the "general rule" that the Board "has broad discretion in the formulation of remedial orders," but noted that the courts of appeal also are delegated the responsibility of determining whether orders should be enforced. *Id.* at 1142. In light of the seven year delay in *Thill* between the conclusion of the ALJ's

proceedings and the NLRB's order, and in the absence of arguments by the Board explaining "why the passage of time had not destroyed the order's utility," the court concluded that enforcement of the part of the order requiring the employer to bargain with the Union was inappropriate. *Id. See also Litton Microwave Cooking Prods., Div. of Litton Systems, Inc. v. NLRB*, 949 F.2d 249, 253 (8th Cir. 1991) ("We do not hesitate to deny enforcement of dilatory Board orders" where passage of time has "changed the underlying situation"), *cert. denied,* 503 U.S. 985 (1992).

4. In any event, as the Union's petition evidences, there are at best a handful of cases dealing with the question presented – and none of those cases conflicts with the Sixth Circuit's decision. The question presented is thus not "important and recurring [in] nature," or otherwise deserving of the Court's attention. Robert L. Stern, *et al.*, *Supreme Court Practice* 228 (8th ed. 2002). At best, even if there were conflict between the circuits, it would amount to little more than the type of "academic or * * * episodic" conflict this Court has found not to warrant a grant of certiorari. *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

Also, despite the NLRB's well-documented history of delay, *see, e.g., Emhart*, 907 F.2d at 378 ("Sadly, however, once a case is presented to the board, 'it appears to enter a new dimension – one where time has little meaning.'" (citation omitted)), the extreme circumstances of this particular case, including a twenty-year delay but still no supportable finding of liability, are mercifully unique. The Union has pointed to no cases on par with these egregious circumstances. That factual distinction makes this case fit neatly into the "extraordinary case" scenario envisioned even by the principal case on which the Union relies,

Southwest Merchandising, 943 F.2d at 1358, and it certainly prevents it from being an appropriate case for ironing out any minor differences in tone between the circuits.

The delay in this case is five times longer than that in *Rutter-Rex*, and also far exceeds the delay in all the cases relied upon by the Union. As noted by the court below, much has changed during the Board's twenty-year wrestling match with this case. Employees at TNS's Jonesboro facility have come and gone. Business contracts dictating the number of employees needed at the facility have come and gone. Any order requiring remedial action on the part of TNS related to the events of 1981 would serve no purpose, particularly if further proceedings, including the first new evidentiary proceedings in this case since 1985, were first required, as they would be, in order to show that TNS even did anything wrong. The Sixth Circuit acted appropriately in vacating the NLRB's order, in part in light of the Board's "inexcusable delay," and there is no reason for this Court to grant certiorari in this case.

II. THE ISSUE PRESENTED BY THE UNION HAS NO PRACTICAL SIGNIFICANCE IN LIGHT OF THE SIXTH CIRCUIT'S UNCHALLENGED RULING THAT THE FACTUAL FINDINGS IN THE NLRB'S ORDER WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

In addition to the fact that the Sixth Circuit's decision does not present a conflict with any other precedent, this Court should also deny the Union's petition because the narrow issue presented by the petition is of little or no consequence, either to the parties in this case or to the

public at large. Even if the Court were to grant the writ and ultimately rule in the Union's favor on the issue presented, the fact remains that the Union would be entitled to no relief from TNS because the court below – based on its careful review of the facts in the voluminous record in this case – held that the Board's liability ruling was not supported by substantial evidence. The Union has not sought review of that fact-intensive ruling, which involved a straightforward application of this Court's decision in *Universal Camera*, 340 U.S. 474, to the rather complicated facts of this case.[2] *See* S. Ct. Rule 10. The NLRB has not sought review of that or any other aspect of the Sixth Circuit's decision. This Court should not expend any more of its limited resources on the purely academic question presented by the Union.

In its petition, the Union misleadingly suggests that the court below refused to enforce the Board's Order "solely" because of the Board's inexcusable delay in handling this case. Pet. i. The thrust of the Sixth Circuit's opinion concerned an application of *Universal Camera* to the facts of this case, however, and the court unequivocally held that the Board's order was not supported by substantial evidence. Pet. App. 32a. In fact, the court resolved that dispositive issue prior to even addressing the impact of this matter's twenty-year odyssey through the NLRB.

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[2] In *Universal Camera*, this Court announced that findings of fact by the Board would be sustained only if supported by substantial evidence in the record, taking into account the entire record and any evidence that fairly detracts from the weight of that evidence in favor of a particular finding. 340 U.S. at 485-488.

As discussed above, the Sixth Circuit's primary basis for not enforcing the Board's order was that the record did not support the Board' finding that the employees' belief that their working conditions were "abnormally dangerous" was supported by "objective evidence" of that danger – a requirement for liability under § 502. *See* Pet. App. 26a-32a, 38a-39a. Engaging in a conventional *Universal Camera* review, the court below sifted through the facts in the record that were relied upon by the Board, and concluded that they did not provide substantial support for the Board's order, stating:

> As mentioned above, the Supreme Court has instructed that when reviewing fact-finding by the Board, courts are to determine whether the findings of fact are supported by substantial evidence by taking into account the evidence upon which the Board relies and "contradictory evidence or evidence from which conflicting inferences could be drawn." *Universal Camera*, 340 U.S. at 487. In the present case, three of the four pieces of evidence relied upon by the Board are not terribly persuasive, and one piece of evidence * * * is either irrelevant to the danger inquiry or evidence of improved conditions. When we also take into account the NRC and TDRH standards and those agencies' lack of decisive regulatory action as evidencing contradicting that evidence, it becomes clear that the Board's conclusion – that objective evidence supported the employees' belief that their workplace had become too dangerous to work in – is simply not supported by

> substantial evidence on the record considered as a whole. [Pet. App. 32a.[3]]

See also Universal Camera, 340 U.S. at 477 ("'substantial evidence is more than a mere scintilla.'" (citation omitted).

This analysis and application of *Universal Camera* meant that the decision of the Board could not stand. *See Universal Camera*, 340 U.S. at 488 ("Congress has * * * made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."). *See also* 5 U.S.C. § 706 ("The reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * unsupported by substantial evidence in a case * * * reviewed on the record of an agency hearing provided by statute").

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[3] The Union asserts in its petition that this issue was raised *sua sponte* by the court below. Pet. 11. The Union is wrong. Throughout the long course of the proceedings in this case, TNS has contested this factual issue. This is evident from the exceptions TNS filed with the ALJ, from the exceptions and briefs filed with the Board, and from the arguments made to the Sixth Circuit. In fact, one of the headings in TNS's brief to the Sixth Circuit is entitled "No Objective Evidence Supports Belief of Abnormal Conditions," TNS's Brief to the Sixth Circuit at 55, and the Union itself devoted twenty-five pages of its Sixth Circuit brief to this issue. Therefore, it is no surprise that the court below noted: "We reject in part and accept in part TNS's challenges to the Board's fact-finding." Pet. App. 3a. In any event, whether the issue was raised *sua sponte* or not has no bearing on the question presented in the petition for certiorari because the Union does not seek this Court's review of that issue.

In light of this record, it is unclear what could be accomplished by another remand to the Board. The ALJ took evidence over the course of two years back in the early 1980s, and deliberated on that evidentiary record for an additional two years. The Board itself had that same evidentiary record before it for over nine additional years. And, given the size of the record (over 23,000 pages) and given that the relevant factual issue only concerns the objective evidence related to the danger posed by the working conditions in the Jonesboro facility in 1981 when the employees went on strike, the Board has not attempted to develop additional evidence in this case since 1985.

Given these circumstances, it is peculiar that the Union suggests that a remand or additional deliberations would serve any purpose in this case, particularly in light of the fact that no party to this proceeding requested that the Sixth Circuit remand the matter to the Board in the event of an adverse ruling. No reason exists for any such remand. No open evidentiary issue or question of law requiring resolution is present. No issue is in need of clarification. Given the enormous record in this case, it is hard to imagine that any such issue could exist, and the Union has not attempted to articulate one. In short, none of the bases typically associated with a need for a remand are present. *See, e.g., Manor West, Inc. v. NLRB*, 60 F.3d 1195, 1198 (6th Cir. 1995) (noting that where the record is fully-developed, remand is unnecessary).

Given this state of affairs, no legal – and certainly no practical – reason suggests why the Sixth Circuit should have prolonged this seemingly interminable case. That is even more true for this Court. The Court has recognized that a grant of certiorari is not appropriate with issues of

"isolated significance." *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. at 76. This case does not even have that going for it; it has neither isolated nor public significance. Likewise, this Court limits itself to answering questions "in the context of meaningful litigation," and leaves other issues until they are "posed less abstractly" in future cases. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). These prudential concerns should also lead the Court to deny the petition in this case, rather than provide the type of "advisory opinion" or engage in the type of "academic" exercise that it has repeatedly eschewed. *Id.* at 184, 185. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("And it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" (citation omitted)); *Rice*, 349 U.S. at 74 ("[T]his Court does not sit to satisfy a scholarly interest"); S. Ct. Rule 10.

The circumstances of this case bring to mind comments this Court made in a different administrative setting that ring true for this case:

> [I]n view of the fact that this controversy already dates back more than eight years, that is has been before the Court of Appeals twice and that the relevant standard is not hard to apply in this instance, we think this controversy had better terminate now. [*Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 621 (1966).]

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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